

No. 21,165

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,  
SECURITY SAVINGS AND LOAN ASSOCIATION AND  
VICTORIA SAVINGS AND LOAN ASSOCIATION,

*Appellants,*

*vs.*

FEDERAL DEPOSIT INSURANCE CORPORATION, etc., *et al.*,

*Appellees.*

---

## REPLY BRIEF OF APPELLANT VICTORIA SAVINGS AND LOAN ASSOCIATION.

---

HAHN & HAHN,  
DAVID K. ROBINSON,

301 East Colorado Boulevard,  
Pasadena, Calif. 91101,

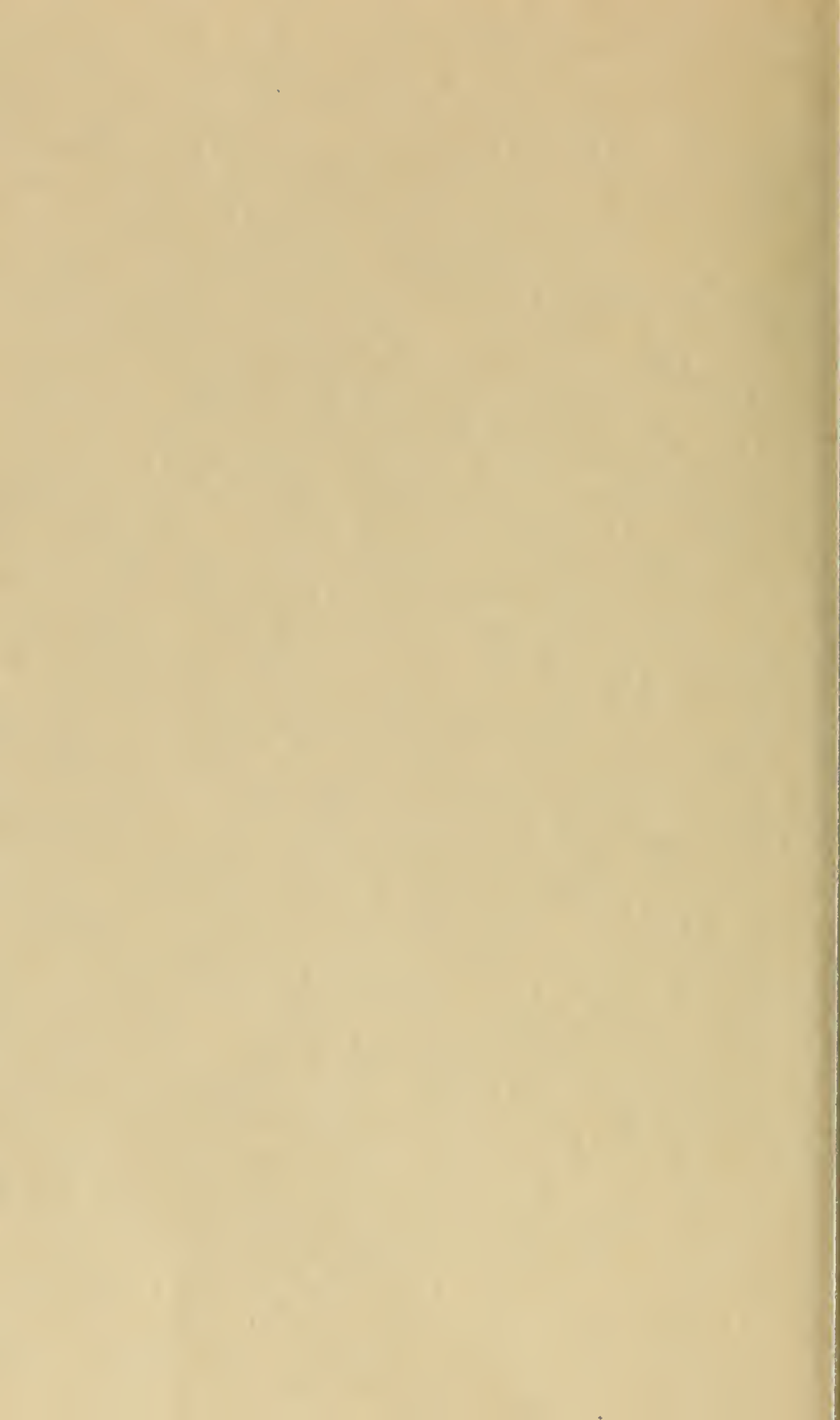
*Attorneys for Appellant Victoria Savings  
and Loan Association.*

FILED

JUN 30 1967

WM. B. LUCK, CLERK

JUL 3 1967



## TOPICAL INDEX

	Page
Preliminary Statement .....	1
I.	
A Motion to Dismiss a Complaint, Counterclaim or Cross-Claim Should Not Be Granted With- out Permission to Amend Unless It Is Certain That the Complainant Would Not Be Entitled to Relief Under Any State of Facts Which Could Be Proved in Support of His Claim .....	2
II.	
Victoria's Claim for Subordination of FDIC Is Not an Action Barred by the Federal Tort Claims Act .....	6
Conclusion .....	10

## TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. Homeowners Loan Corp., 107 F. 2d 139 ..	9
American Surety Co. v. Bethlehem National Bank, 314 U.S. 314, 86 L. Ed. 241 .....	8
Atchley v. Tennessee Valley Authority, 69 F. Supp. 972 .....	9
Bonanno v. Thomas, 309 F. 2d 320 .....	4
Freeling v. Federal Deposit Insurance Corporation, 221 F. Supp. 955, aff'd, 326 F. 2d 971 .....	8
Grant v. Tennessee Valley Authority, 49 F. Supp. 564 .....	9
B. C. Morton International Corporation v. FDIC, 305 F. 2d 692 .....	7, 8
Pacific National Fire Insurance Co. v. Tennessee Valley Authority, 89 F. Supp. 978 .....	9, 10
Scott v. Armstrong, 146 U.S. 499 .....	8
Sidebotham v. Robison, 216 F. 2d 816 .....	4
Tipton v. Bearl Sprott, 175 F. 2d 432 .....	4
Topping v. Fry, 147 F. 2d 715 .....	4

### Rules

Federal Rules of Civil Procedure, Rule 24 .....	5
---	---

### Statutes

United States Code, Title 12, Sec. 1819 .....	10
United States Code, Title 28, Sec. 1346(b) .....	10
United States Code, Title 28, Sec. 2679(a) .....	10
United States Code, Title 28, Sec. 2680(a) .....	7
United States Code, Title 28, Sec. 2680(h) .....	7, 8

No. 21,165  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,  
SECURITY SAVINGS AND LOAN ASSOCIATION AND  
VICTORIA SAVINGS AND LOAN ASSOCIATION,  
*Appellants,*  
*vs.*

FEDERAL DEPOSIT INSURANCE CORPORATION, etc., *et al.*,  
*Appellees.*

---

**REPLY BRIEF OF APPELLANT VICTORIA  
SAVINGS AND LOAN ASSOCIATION.**

---

**Preliminary Statement.**

This reply brief is in response to the brief of appellee Federal Deposit Insurance Corporation (hereinafter called "FDIC") and the brief of appellees A.M.R., Inc., *et al.*

The brief of appellee FDIC is divided into a section on the appeal of AT&T (pp. 7-23) and a section on the appeal of Victoria as to the claim raised by Victoria in its sixth cause of action which is not included in the complaint of AT&T (pp. 24-37).

As a reply to the brief of appellee FDIC on the appeal of AT&T, Victoria adopts and incorporates in full the reply brief of AT&T filed herein on or about June 7, 1967, since the position of Victoria with re-

gard to the applicable law and the essential facts is substantially identical to that of AT&T with the exception of certain factual differences as stated in Victoria's opening brief filed herein. In addition Victoria will herein expand and supplement briefly the argument made by AT&T in its reply brief. Victoria herein will also respond to the sections of the brief of appellee FDIC directed to the appeal of Victoria.

I.

**A Motion to Dismiss a Complaint, Counterclaim or Cross-Claim Should Not Be Granted Without Permission to Amend Unless It Is Certain That the Complainant Would Not Be Entitled to Relief Under Any State of Facts Which Could Be Proved in Support of His Claim.**

Appellee FDIC seeks to justify the dismissal of the complaint, counterclaims and cross-claims in this matter insofar as the causes of action impose a constructive trust on the ground that there is failure to allege that the San Francisco National Bank (hereinafter referred to as "BANK") was hopelessly and irretrievably insolvent (Appellee FDIC Br. pp. 8-11). Appellant Victoria in its cross-claim and counterclaim alleged that Bank was insolvent on the date that the certificate of deposit and the cashier's check which formed the basis of the claim of Victoria herein were issued to it [R. 24]. AT&T alleged in its complaint that Bank at the time its certificates of deposit were issued was either insolvent or in imminent danger of becoming insolvent [R. 6].

Victoria's position is that an allegation of "hopeless and irretrievable insolvency" is not necessary to state a cause of action for a constructive trust and rescis-



sion. Secondly, this is a factual question and can be proved under the allegation it made of Bank's insolvency. Third, if it is necessary to so allege, Victoria should be permitted to amend to so comply. It is of the utmost importance that the Appellate Court fully understand the circumstances concerning the dismissals from which orders therefor these appeals are taken.

Judge Mathes, on his own motion and without notice to any of the parties to this action, and without hearing or affording any of the parties a chance to brief the law on the subject, suddenly dismissed the action excepting as against FDIC [R. 90]. The appellants then made motions to vacate said order [R. 95, 112, 423] and FDIC countered with a motion to dismiss the remaining portions of the complaint and crossclaims against FDIC [R. 126], in which it did not raise in its memorandum the sufficiency of the allegations *re* insolvency and Judge Mathes denied, once again without hearing, the motions to vacate [R. 157] and granted the motion to dismiss [R. 55] but indicated in these orders that the reason he was dismissing the action, including the crossclaims, was not on any of the bases set forth in the brief of appellee FDIC, but because he believed that these claims should be brought by intervention in the Liquidation proceedings, Case #43512 then pending in the District Court [R. 155 and 157]. Thus there was no provision in the order permitting amendment, or any indication that the Judge had considered this highly technical point now raised by appellee FDIC.

As stated in AT&T's reply brief, at page 2, an allegation of hopeless and irretrievable insolvency is unnecessary to sustain an action for rescission or imposition

of a constructive trust. The degree of insolvency is a question of fact which it is submitted appellant Victoria is entitled to have tried under its allegation that Bank was insolvent. If the court feels that the words "hopeless and irretrievable" are necessary before the word "insolvent" it is submitted that appellant Victoria should be granted permission to amend its complaint to add these words.

It has long been the rule of this court that a motion to dismiss a complaint will not be granted without permission to amend unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim.

*Sidebotham v. Robison* (9th Cir. 1954), 216 F. 2d 816, 823;

*Bonanno v. Thomas* (9th Cir. 1962), 309 F. 2d 320;

*Tipton v. Bearl Sprott* (9th Cir. 1949), 175 F. 2d 432;

*Topping v. Fry* (7th Cir. 1945), 147 F. 2d 715, 718.

Though the granting of a motion to dismiss a complaint may be good as to a particular complaint leave to amend should be granted where existence of facts which, if alleged, would cure defects in the complaint, is shown, though no request to amend the pleadings is made to the court.

*Bonanno v. Thomas, supra*;

*Sidebotham v. Robison, supra*.

The existence of some of the facts to show such hopeless and irretrievable insolvency is shown on page 3



of the reply brief of AT&T and, in the interest of brevity, will not be repeated here.

It is not conceivable that Judge Mathes, in his orders dismissing the complaint, counterclaims and cross-claims, other than as against FDIC, and on his own motion without notice or hearing [R. 90], or in his order refusing the motions of AT&T and appellant Victoria to vacate said order [R. 157], or in his order dismissing the action as against FDIC on the motion of FDIC [R. 155] was doing so on the ground urged by FDIC in its appellee's brief, to wit, the failure to properly allege insolvency, or on the basis of the Federal Torts Claims Act. A consideration of these orders indicates that Judge Mathes dismissed these claims without prejudice and on the theory that in his opinion they should have been brought by intervention in the liquidation proceedings under Federal Rule of Civil Procedure 24, in Civil Action #43512, In the Matter of the Liquidation of the San Francisco National Bank [R. 155, 157].

Appellants herein followed the suggestions contained in the orders of Judge Mathes by presenting petitions to intervene in said liquidation proceedings, and were immediately met with motions to dismiss of appellees FDIC, on the ground that said proceeding was not the proper proceeding in which appellants could bring their claims. Unfortunately for appellants, the liquidation proceeding was handled by another judge, who had a different opinion than Judge Mathes had on whether the claims of appellants should be brought in the liquidation proceeding or in a plenary suit and the effect of the difference of opinion of these two learned judges was to deprive appellants of a forum to litigate

their claims and to amend the complaint if there were any necessary allegations left out. Judge Wollenberg dismissed the petitions of appellants herein, which order is the subject of the appeal pending in this court, case #21258C.

Despite the claims of FDIC to the contrary contained in its brief herein (p. 37) the effect of the action of FDIC in moving to dismiss in both this case and in case #43512, is to deny the appellants a hearing on the merits of their claims in either the liquidation proceeding or in a plenary suit, and in its brief on the technical ground that appellants have not sufficiently pleaded hopeless insolvency, a ground on which the lower court did not grant the dismissal, or apparently even considered.

## II.

### **Victoria's Claim for Subordination of FDIC Is Not an Action Barred by the Federal Tort Claims Act.**

Excepting for certain factual differences set forth in Victoria's opening brief filed herein, and excepting for Victoria's sixth count of its cross-claim which is directed against appellee FDIC, Victoria's cross-claims are identical to those of appellant AT&T. Victoria, in the sixth count of its cross-claim, which is directed against appellee FDIC, seeks to have the claim of FDIC against Bank subordinated to the claim of Victoria by reason of certain wrongful and inequitable acts of said FDIC and other participating federal agencies [R. 30-34]. By making this claim against FDIC, Victoria is not seeking a claim for money damages, but rather is invoking the equitable jurisdiction of the court to have the claim of another claimant in Bank, to wit,

FDIC, because of certain wrongful acts of said claimant, subordinated to the claim of Victoria.

Appellee FDIC in its brief (pp. 22-23) states that Victoria's cause of action for subordination is not a proper cause of action because of the provisions of the Federal Tort Claims Act and, in particular, sections 28 U.S.C. 2680(a)(h) and, secondly, because the acts complained of involve discretionary governmental duties.

Appellee FDIC in its brief does not cite any case in which a court has held that an equitable type of claim and relief requesting subordination and the imposition of a constructive trust rather than a money judgment was a claim under the Federal Tort Claims Act and, therefore, subject to the provisions of said Act, to wit, that it must be brought against the United States and, further, that it would be barred by Sections 28 U.S.C. 2680(a) and 2680(h), to wit discretionary acts and claims founded on misrepresentation or deceit.

The only case which appellants have been able to find in point confirms the position of appellants that the Federal Tort Claims Act is limited to an action for money damages and does not prohibit an action against a federal agency for equitable relief. This is the case of *B. C. Morton International Corporation v. FDIC* (1st Cir. 1962), 305 F. 2d 692, which involved an action against FDIC for a declaratory judgment and injunctive relief on the ground that the officials at FDIC had been guilty of misrepresentation. The District Court dismissed the action but the First Circuit reversed, vacating the judgment of the District Court and stating in footnote 2 on page 695 as follows:

“The exclusive remedy provision of the Federal Tort Claims Act (28 U.S.C. §2679(a)) does not

bar this action since it is not an action for money damages cognizable under 28 U.S.C. §1346(b). See the text of 28 U.S.C. §§2679(a) and 1346(b); 2 Harper & James, Torts §29.12 (1956).”

The distinction between a suit for monetary damages and a suit for injunctive or other equitable relief which is permitted under the theory of *B. C. Morton International v. FDIC supra* was clearly pointed out by the court in the case of *Freeling v. Federal Deposit Insurance Corporation*, 221 F. Supp. 955 (W.D. Okla. 1962), aff'd per curiam, 326 F. 2d 971 (10th Cir. 1963) cited by appellee in its brief filed herein at page 25. The *Freeling* case involved an action for damages for slanderous statements alleged to have been made by officials of FDIC and the court distinguished on page 957 *B. C. Morton International Corporation v. FDIC supra* case on the ground that said action, even though it was based upon certain alleged misrepresentations, sought a remedy of declaratory relief and injunctive relief and, therefore, was properly maintainable against FDIC as contrasted with the action seeking monetary damages for slander, which came under the exclusive remedy of the Federal Tort Claims Act and could not be maintained due to the limitations of Section 2680(h) Title U.S.C. prohibiting an action for slander.

The Supreme Court has recognized that in the distribution of assets of an insolvent national bank equitable principles govern, and that priorities may be granted where the facts justify the same irrespective of the ratable distribution provisions of the statute.

*Scott v. Armstrong* (1892), 146 U.S. 499;

*American Surety Co. v. Bethlehem National Bank* (1941), 314 U.S. 314, 86 L. Ed. 241.



Victoria in seeking to have the claim of FDIC in the liquidation of Bank subordinated to the claim of Victoria is doing so on the basis of equitable principles and, in addition, is seeking an equitable remedy, to wit, subordination rather than a claim for money damages. Appellee FDIC's failure to recognize this distinction in remedy is the fallacy of the arguments made by FDIC in its brief, both as to the applicability of the Federal Tort Claims Act and as to the non-liability of FDIC for discretionary acts of its officers. In connection with the latter theory which is discussed on pages 32-35 of appellee FDIC's brief, the cases cited are those seeking damages against a governmental agency rather than seeking to apply equitable principles such as the doctrine of subordination of a claimant in the liquidation of a bank due to certain non-equitable activities on the part of said claimant.

*Pacific National Fire Insurance Co. v. Tennessee Valley Authority* (W.D. Va. 1950), 89 F. Supp. 978, *Atchley v. Tennessee Valley Authority* (N.D. Ala. 1947), 69 F. Supp. 972, and *Grant v. Tennessee Valley Authority* (E.D. Tenn. 1942), 49 F. Supp. 564 all involved claims for damages against Tennessee Valley Authority to property allegedly due to acts of Tennessee Valley Authority, and the case of *Adams v. Homeowners Loan Corp.* (8th Cir. 1939), 107 F. 2d 139 involved a claim for damages due to malicious prosecution. Not only is each of these cases a case seeking a monetary judgment and, therefore, not applicable to Victoria's request for subordination of the FDIC claim and to impose a constructive trust thereon on equitable principles, but also in the *Grant* and *Adams* cases judgment for the defendant was on the grounds of public

policy, and in the *Pacific National Fire Insurance Co.* case the judgment for the defendant, in addition to the ground of a discretionary act, was also on the ground that the damage was so incidental and consequential in character that it was non-compensable.

Title 28 U.S.C. 1346(b) permits a suit to be maintained against the Federal Deposit Insurance Corporation. It is only "civil actions on claims against the United States, for money damages" 28 U.S.C. 1346(b) that come under the exclusive remedy provisions of the Federal Tort Claims Act 28 U.S.C. 2679(a). Since this is not an action for money damages the "sue and be sued" provisions of 28 U.S.C. 1346(b) permit this action to be maintained against FDIC.

### Conclusion.

Appellee FDIC does not seek to have the orders of dismissal appealed from herein affirmed on the grounds indicated by Judge Mathes in his order, to wit, that these claims should be brought in the liquidation proceeding, since FDIC opposed said procedure in the liquidation proceeding, but rather on the technical grounds that the appellants had not pleaded insolvency of Bank sufficiently to impose a constructive trust on its assets and without a case in point on the ground that an action seeking to subordinate the claim of FDIC was a claim barred under the Federal Tort Claims Act. Victoria requests this court to resolve the procedural differences as to the proper forum for appellants to bring their claims between the views of Judge Mathes and those of Judge Wollenberg, and to permit appellants to have their day in court on the merits of their respective claims.



For the foregoing reason we respectfully submit that this court should reverse the orders dismissing this action, including the counterclaims and cross-claims of appellant Victoria, and that said appellant be permitted to proceed to trial on the merits of its claim.

Respectfully submitted,

HAHN & HAHN,  
DAVID K. ROBINSON,

By DAVID K. ROBINSON,  
*Attorneys for Appellant Victoria Savings  
and Loan Association.*



### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID K. ROBINSON

